

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
JIN K. CHOI,	)	CASE NO. 10-90403 - MHM
	)	
Debtor.	)	
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PROMAX INVESTMENTS, LLC,	)	
	)	
Plaintiff,	)	ADVERSARY PROCEEDING
v.	)	NO. 11-5104
	)	
JIN K. CHOI,	)	
	)	
Defendant.	)	

**ORDER DENYING IN PART AND GRANTING IN PART  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Debtor's main bankruptcy case commenced October 8, 2010. The *Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, and Deadlines* entered October 11, 2010, set forth that the deadline for filing complaints objecting to discharge and dischargeability was January 14, 2011 (the "Bardate") (Doc. No. 4). On January 17, 2011, Promax Investments, LLC ("Plaintiff") filed in the main bankruptcy case an *Objection to Debtor's Chapter 7 Discharge* (Doc. No. 23) (the "Objection"). By order entered January 25, 2011, the Objection was stricken because it was filed after the Bardate; also the Objection was not commenced as an adversary proceeding with the filing of a complaint and payment of a filing fee of \$250 (Doc. No. 27).

Plaintiff filed a motion for reconsideration on the grounds that during the week of January 10-14, 2011, the Governor of Georgia had declared a state of emergency due to

severe winter weather and icy road conditions (Doc. No. 31) (the “Motion for Reconsideration”).<sup>1</sup> Plaintiff’s attorney, whose office is located in Suwanee, Georgia, states he was unable to access his office and his records until January 17, 2011.<sup>2</sup> In the Motion for Reconsideration, Plaintiff requested an extension of time for filing a complaint to determine dischargeability of its claim against Debtor. By order entered February 18, 2011, Plaintiff’s Motion for Reconsideration was granted, allowing Plaintiff to file a complaint objecting to Debtor’s discharge and to determine dischargeability (Doc. No. 35).<sup>3</sup>

The Complaint commencing this adversary proceeding was filed February 22, 2011 (the “Complaint”). In the Complaint, Plaintiff seeks (1) a determination that its claim against Debtor is nondischargeable under §523(a); (2) denial of Debtor’s discharge under §727(a); (3) avoidance of certain alleged fraudulent transfers (presumably under 11 U.S.C. §§544 or 548); and (4) transfer of the proceeding to the U.S. District Court for criminal sanctions.<sup>4</sup> Debtor filed his answer March 24, 2011, raising the timeliness of the complaint as an affirmative defense (Doc. No. 4) (the “Answer”).

Defendant has filed a motion for summary judgment seeking judgment on the grounds that the Complaint was not timely filed under Bankruptcy Rules 4004 and 4007.

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<sup>1</sup> The courthouse and the office of the Bankruptcy Clerk were open for business January 13 and 14, 2011, although all scheduled hearings had been canceled.

<sup>2</sup> The Objection was filed electronically.

<sup>3</sup> By order entered April 11, 2011, Debtor’s discharge, which had been entered February 7, 2011 (the same day that the Motion for Reconsideration was filed) was vacated.

<sup>4</sup> Plaintiff has not filed a motion to withdraw the reference under 28 U.S.C. §157(d), or advised the U.S. Trustee of the need to pursue a criminal reference or seek the involvement of the U.S. Attorney.

Alternatively, Defendant seeks partial summary judgment on: (a) Plaintiff's claims to avoid fraudulent transfers, on the grounds that Plaintiff lacks standing to assert such claims, and (b) Plaintiff's request to transfer the proceeding to the U.S. District Court. Plaintiff responded to Defendant's motion, making essentially the same arguments as in the Motion for Reconsideration as to the timeliness issue; and as to the standing issue, Plaintiff asserts the court should accord it derivative standing or direct the Chapter 7 trustee to pursue recovery of the alleged fraudulent transfers.

In the case of *Byrd v. Alton*, 837 F. 2d 457 (11<sup>th</sup> Cir. 1988), the Eleventh Circuit Court of Appeals determined that the time limitation in Bankruptcy Rule 4007 (and by logical extension Rule 4004) is mandatory and does not allow the court any discretion to allow a late-filed motion for extension of the Bardate. The holding in *Alton* has been characterized as based upon a finding that the deadlines in Bankruptcy Rules 4007 and 4004 are jurisdictional. In the case of *Kontrick v. Ryan*, 540 U.S. 443 (U.S. 2004), the Court determined that the rules governing the bardate for creditors to file objections to discharge and dischargeability (Bankruptcy Rules 4004 and 4007) are not jurisdictional. The Court expressly reserved the issue of whether equitable tolling may apply to extend the bardate in some circumstances.

Since the decision in *Kontrick*, the Eleventh Circuit Court of Appeals has not expressly addressed whether consideration of circumstances justifying equitable tolling may be appropriate to apply in extending the time limitations in Bankruptcy Rules 4004 and 4007. In *IBT International, Inc. v. Northern (In re International Administrative Services, Inc.)*, 408 F.3d 689 (11<sup>th</sup> Cir. 2005), the court recognized that the principles of equitable tolling are applicable to extensions of statutory statutes of limitation. That

decision addressed the filing by the estate representative of an action to avoid alleged fraudulent transfers and confirmed an extension of the two year deadline under 11 U.S.C. §546.

In *Alabama Department of Economic and Community Affairs v. Lett*, 368 Fed. Appx. 975 (11<sup>th</sup> Cir. 2010), the court upheld dismissal of the plaintiff's dischargeability complaint post-trial because it was not timely filed. The court explained that the timeliness defense had been preserved by defendant's pleading untimeliness in the answer and was not forfeited by failing to pursue it until post-trial. The court also found that the omission in the §341 Notice of a bardate did not warrant granting equitable relief to the plaintiff.

In the case of *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F. 3d 1228 (11<sup>th</sup> Cir. 2007), the opposing party promptly filed a motion to dismiss the plaintiffs' notice of appeal because no motion for leave to appeal was timely filed. Relying on *Eberhart v. U.S.*, 546 U.S. 12 (2005), which contains a holding similar to that in *Kontrick*, although in a different context, the Eleventh Circuit Court of Appeals held that a court may not ignore timely-raised procedural challenges under Fed. R. App. Proc. 5 simply because the rules's requirements are not jurisdictional. The appeal was dismissed.

Some courts in other jurisdictions have applied equitable considerations to extend the bardates under Rules 4004 and 4007. In *Official Committee of Unsecured Creditors of the Project Group, Inc. v. Crawford*, 347 B.R. 42 (Bankr. S.D. Tex. 2006), relying on *Kontrick*, the court allowed an extension of the bardate because of the Clerk's affirmative misstatement of the bardate in the §341 Notice. In the case of *DeAngelis v. Rychalsky*, 318 B.R. 61 (Bankr. D. Del. 2004), when the U.S. Trustee filed a motion to amend the

complaint objecting to the debtor's discharge, the debtor objected to the amendment as untimely because it raised new grounds for objection to discharge and was filed after the bardate. The U.S. Trustee had filed its amendment because, during discovery, the U.S. Trustee discovered previously undisclosed evidence of fraudulent activity by the debtor. Relying on *U.S. v. Locke*, 471 U.S. 84 (1985), *Rotella v. Wood*, 528 U.S. 549 (2000), and the Eleventh Circuit's *IBT International* opinion, *supra*, the court applied equitable tolling to allow an extension of time. The court explained that equitable tolling is appropriate when the defendant actively misled the plaintiff or concealed grounds for a claim for relief; when the plaintiff in some extraordinary way has been prevented from asserting its rights; or when the plaintiff timely asserted its rights but in the wrong forum.

The facts in the instant case present unusual and extraordinary circumstances in which Plaintiff was prevented - by atypical and unexpected weather conditions - from timely filing its complaint. Suwanee, where Plaintiff's attorney is located, is north of Atlanta and therefore suffered a greater impact from the weather on travel. In the South, as winter weather is so infrequently severe, recovery from severe winter weather is usually more extended than in the northern climes. The relatively short delay in Plaintiff's filing of the Objection does not appear to have caused prejudice to Defendant's ability to defend himself in this adversary proceeding. Equitable tolling of the Bardate is appropriate and Plaintiff's complaint will be allowed as having been timely filed.

With respect to Count II of Plaintiff's complaint, which seeks to set aside the alleged fraudulent transfers, both 11 U.S.C. §§544 and 548 accord standing only to the Chapter 7 Trustee to pursue such actions. Plaintiff presented no facts to support a finding that it is entitled to any sort of derivative standing. As the Chapter 7 Trustee is not a party

to this adversary proceeding, any order in this adversary proceeding directing the Chapter 7 Trustee to pursue recovery of the alleged fraudulent transfers would be inappropriate.

With respect to Plaintiff's request to transfer this proceeding to the U. S. District Court to address criminal sanctions against Debtor, Plaintiff has presented no factual or legal argument to support such an action. Plaintiff lacks standing to sue under the criminal statutes because it is not authorized to proceed on behalf of the United States.<sup>5</sup> Accordingly, it is hereby

**ORDERED** that Defendant's motion for summary judgment on the grounds that the Complaint was untimely filed is *denied*. It is further

**ORDERED** that Defendant's motion for partial summary judgment dismissing Count II in the Complaint seeking to avoid alleged fraudulent transfers is *granted*. It is further

**ORDERED** that Defendant's motion for partial summary judgment regarding Plaintiff's prayer to transfer this proceeding to the U.S. District Court for criminal sanctions is *granted*.

The Clerk is directed to serve a copy of this order upon Plaintiff's attorney, Debtor, Debtor's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 30<sup>th</sup> day of March, 2012.

  
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MARGARETH MURPHY  
UNITED STATES BANKRUPTCY JUDGE

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<sup>5</sup> Criminal statutes define crimes and punishments for crimes. Crimes are offenses against a state or the United States. Crimes defined in the United States Code may be prosecuted only by agents designated and empowered by the executive branch of the federal government to prosecute persons for violations of a federal criminal statute.